IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.1052 OF 1996

The State of Maharashtra & Ors. ...Petitioners
Vs.
Vinodkumar Vrandavandas Kanabar ...Respondent

Mr.A.S. Gadkari, A.P.P. for the State.
Mr.V.V. Kanabar for the Respondent.

CORAM : A. S. OKA, J.
DATE : OCTOBER 06, 2005.

P.C.:

1. Heard the learned A.P.P. for the State and the learned Advocate for the Respondent. The challenge in this Petition filed under Article 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as said Code of 1973) is to the orders dated 2nd September, 1996 and 30th September, 1996 passed by the learned 17th Metropolitan Magistrate Court, Mazgaon, Mumbai in private complaint filed by the Respondent.

2. With a view to appreciate with the submissions made by the Advocates for the parties, it will be necessary to refer to the facts of the case. The Respondent filed a private complaint against the Petitioner Nos.2 to 4 alleging commission of offence under sections 403, 405, 418, 427 and 166 of the Indian Penal Code. The Petitioner Nos.2 to 4 at the

relevant time were the officers of the Maharashtra Housing and Area Development Authority (hereinafter referred to as MHADA) incorporated under the provisions of Maharashtra Housing and Area Development Authority Act, 1976 (hereinafter referred to as said Act of 1976). The allegation made in the complaint by the Respondent, in short, is that the Respondent is a tenant occupying a tenament in a building named as "Israel Chawl". It is the case of the Respondent that the building is a non-cess building. The case of the Respondent is that the landlord unauthorisedly collected Repair Cess from the tenants of the said building and deposited with the Bombay Municipal Corporation. The allegation against the Petitioner Nos.2 to 4 is that on their Application, the Bombay Municipal Corporation transferred the amount which is nearly Rs.5 lacs to MHADA and the said amount has been dishonestly misappropriated. Initially, the learned Magistrate passed an order for investigation under section 202 of the said Code of 1973. The Investigating Officer submitted a report stating that there was no substance in the complaint. By impugned order dated 02nd September, 1996, the learned Magistrate observed that the Investigating Officer has not carried out the inquiry satisfactorily and therefore, it was necessary to call the accused

persons by issuing process. An Application was made by the Advocate appearing for the Petitioner Nos.2 to 4 praying for adjournment of the hearing and for grant of exemption. By order dated 30th September, 1996, the learned Magistrate directed the Petitioner Nos.2 to 4 to execute P.R. Bond of Rs.5,000/- each for appearance under section 88 of the said Code of 173 and they were directed to furnish surety of Rs.5,000/- each within fifteen days.

3. The learned A.P.P. appearing for the State submitted that no offence has been made out against the Petitioners even if the assertions made in the complaint are taken to be true. He referred to the inquiry report submitted by the Investigating Officer. He submitted that even according to the the original complainant, the Petitioner Nos.2 to 4 are public servants and therefore, the learned Judge could not have taken cognizance of the complaint as there was no sanction granted for the prosecution. He invited my attention to the various averments made in the complaint.

4. The learned Advocate appearing for the Respondent submitted that bar of Section 197 of the said Code of 1973 will not apply. He clarified that

it is not the case of the Respondent that amount of Repair Cess is personally taken by the Petitioner Nos.2 to 4 and that they have appropriated the said amount. He submitted that on the Application made by the said Petitioners, the amount was transferred by the Bombay Municipal Corporation to MHADA. He submitted that Repair Cess could not have been recovered from the occupants of the building. He pointed out that Repair Cess were illegally collected by the landlord which was transferred to the Bombay Municipal Corporation and the Bombay Municipal Corporation after deducting the commission have transferred the same to the Petitioner Nos.2 to 4 and clear case of commission of offence is made out. He submitted that Petitioners have remedy to approach the same court which passed the orders in private complaint.

5. I have considered the submissions. It is not in dispute that the Petitioner Nos.2 to 4 are the Officers of MHADA. It is also not in dispute that the amount of Repair Cess was collected by the landlord and deposited with the Bombay Municipal Corporation and in turn the Bombay Municipal Corporation transmitted the said collected amount to the MHADA. It is not disputed that the Bombay Municipal

Corporation has transferred the said amount to the MHADA and the said amount is not received or is not appropriated by the Petitioner Nos.2 to 4 for their own use. It will be necessary to refer to the material averments in the complaint. In paragraph No.3 of the complaint, it is contended that the Cess could not have been recovered in respect of the said building. Paragraph Nos.4 to 6 of the complaint reads thus:

> "4. As per the notification or order of competent authority, the landlord of the building collected the 'Repair Cess' alongwith the other levies and rent and deposited till 1992 the repair cess at the B.M.C. Office, E-Ward,Bombay.
>
> 5. As per B.M.C. Act and MHADA Act the deposited amount of Repair Cess credited to the consolidated Fund the State and then it transferred to the Fund of Authority.
>
> 6. This unauthorised, illegally collected and deposited 'Repair Cess' by landlord from tenants to B.M.C. and

B.M.C. to State Govt. after deduction of commission, which intentionally dishonestly misappropriated by the aiding, abetting and instigation by the accused with the some of the interested tenants for repairing of the building. The amount is nearly Rupees Five lacs Rs.5,00,000/-."

Paragraph Nos.8 to 11 read thus:

"8. These accused as mentioned hereinabove paragraph No.(3) and (4) illegal and unauthorised ‘Repair Cess’ collected which these accused have taken dominion over it, knowing that they are not entitle to utilise it as they like, they have dishonestly misappropriated and converted it to their own use that is dishonestly used or disposed in violation of B.M.C. Act and other related Act. The accused are being public servant as per MHADA Act committed the offence punishable u/s.409 of the Indian Penal Code.

9. As mentioned hereinabove paragraphs, the accused were knowing that wrongful loss will be incurred to the interested tenants who agreed to dispose of the illegal, unauthorisedly collected repair cess, and this interest these accused being senior officer of Authority are bound to protect, but cheated the interested tenants to allow them to dispose of, thus the accused committed the offence punishable as per Sec.418 of the Indian Penal Code.

10. As mentioned in foregoing paragraphs the accused knowing that they are likely to cause wrongful loss of lacs of rupees collected illegally and unauthorisedly as repair cess, by disposing them on which the interested tenants have no total rights, so to other tenants incurred the wrongful loss by these accused thus committed the offence punishable u/s.427 of the Indian Penal Code.

11. As mentioned hereinabove

paragraphs the accused are being public servant knowingly disobeyed the MHADA Act, knowing it to be likely that they will by such disobedience cause wrongful loss to other tenants who never applied for any repairing of building, and misappropriated the whole amount collected in consolidated fund and committed the offence punishable u/s.166 of Indian Penal Code.

6. On plain reading of the complaint, the grievance seems to be of illegal recovery of the Repair Cess by the landlord. From the complaint, it is clear that the Repair Cess has ultimately gone to MHADA and not to the Petitioner Nos.2 to 4. Therefore, there is no question of the Petitioner Nos.2 to 4 dishonestly misappropriating the amounts of Repair Cess or converting the said amounts for their own use. Therefore, section 403 of the Indian penal Code is not applicable. Section 409 of the Indian Penal Code also does not apply as it is obvious that the property, namely, the amount of repair cess was not entrusted to the Petitioner Nos.2 to 4. Even Section 418 cannot be applied as even according to the case of the Respondent, the amount of Repair Cess is

collected by the landlord and ultimately, it is transferred to MHADA. An attempt is made to say that even Section 427 will apply. It cannot be said that the Petitioner Nos.2 to 4 have committed any mischief or have caused any damage. Section 166 of the Indian Penal Code will not apply as it is not at all asserted in the complaint that the Petitioner Nos.2 to 4 have disobeyed the law. Even according to the case of the complainant, the amount is collected by the landlord and it has ultimately gone to MHADA. There is nothing on record to show that the Petitioner Nos.2 to 4 permitted or directed the landlord to collect the amount of Repair Cess.

7. The real grievance of the Respondent appears to be that the occupants are not liable to pay Repair Cess and Repair Cess was illegally collected by the landlord and was paid to the Authorities. Even assuming that whatever stated in the complaint is correct, ingredients of none of the offences are satisfied. The report of the investigation submitted by the Investigating Officer also discloses that no offence has been made out. In the circumstances, the order dated 02nd September, 1996 is liable to be set aside. In view of the law recently laid down by the Apex Court, the Petitioners have no remedy to approach

the same Court for setting aside order issuing process and hence, objection to that effect raised by the Advocate for the Respondent is not tenable.

8. Accordingly, Petition must succeed and rule is made absolute in terms of prayer clause ‘c’.

JUDGE